

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH  
CENTRAL DIVISION

<p>DARIUZ JOZEF SULICH, Plaintiff,</p> <p>vs.</p> <p>SYSCO INTERMOUNTAIN FOOD SERVICES INC., Defendant.</p>	<p>MEMORANDUM DECISION AND ORDER DENYING PLAINTIFF'S MOTION TO ALTER JUDGMENT</p> <p>Case No. 2:04-CV-428 TS</p>
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This matter is before the Court on Plaintiff's Motion to Alter Judgment. Plaintiff moves to alter the judgment under Rule 59(e)<sup>1</sup> and also to amend under Rule 60(b)(1)<sup>2</sup> on the grounds of mistake.

Plaintiff's Motion was made within ten days of entry of judgment. "District courts should evaluate postjudgment motions filed within ten days of judgment based on the reasons expressed by the movant, not the timing of the motion."<sup>3</sup>

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<sup>1</sup>Fed.R.Civ.P. 59(e).

<sup>2</sup>Fed.R.Civ.P. 60(b)(1).

<sup>3</sup>*Jennings v. Rivers*, 394 F.3d 850, 855 -856 (10th Cir. 2005).

In the present case, Plaintiff alleges that the Court made a mistake by granting summary judgment because he argues that when the Defendant raised pretext as a defense, a presumption should have arisen that Plaintiff had already established his prima facie case.<sup>4</sup> He also contends that he has evidence to support the elements of his prima facie case. The Court finds that these reasons support analyzing his Motion under Rule 59(e).<sup>5</sup>

Grounds warranting relief under Rule 59(e) “include (1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice. Thus, a motion for reconsideration is appropriate where the court has misapprehended the facts, a party's position, or the controlling law. It is not appropriate to revisit issues already addressed or advance arguments that could have been raised in prior briefing.”<sup>6</sup>

Contrary to Plaintiff's arguments, Defendant did raise the issue of a lack of evidence of a prima facie case.<sup>7</sup> As noted in the Court's Summary Judgment Order, to “meet the burden of production required to support summary judgment, the movant need only point

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<sup>4</sup>Docket No. 26, Pl.'s Motion to Alter Judgment at 2.

<sup>5</sup>*Dalton v. First Interstate Bank of Denver*, 863 F.2d 702, 703-04 (10th Cir.1988) (“This court has consistently held that regardless of how styled, a motion questioning the correctness of a judgment and timely made within ten days thereof will be treated under Rule 59(e).”), *superseded by statute on other grounds*.

<sup>6</sup>*Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000); (citing *Van Skiver v. United States*, 952 F.2d 1241, 1243 (10th Cir. 1991) (other citations omitted)).

<sup>7</sup>Docket No. 15, Def.'s Mem. at 14-17 (arguing that “plaintiff has failed to establish the second, third and fourth elements of his prima facie case”).


to those portions of the record that demonstrate an absence of a genuine issue of material fact given the relevant substantive law.”<sup>8</sup> Thus, once the lack of the prima facie elements of his case was pointed out by Defendant, Plaintiff had the burden of coming forward with “sufficient evidence (pertinent to the material issue) [that] must be identified by reference to an affidavit, a deposition transcript, or a specific exhibit incorporated therein.”<sup>9</sup> Plaintiff did not meet that burden for the reasons stated in the Summary Judgment Order.

The Court finds that Plaintiff’s arguments merely revisit his past arguments or attempt to raise an issue of fact without showing that the facts he relies upon constitute “new evidence previously unavailable.”<sup>10</sup> Plaintiff has not shown grounds to alter or amend the Judgment. It is therefore

ORDERED that Plaintiff’s Motion to Alter Judgment (Document No. 26) is DENIED.

DATED September 25, 2006.

BY THE COURT:

  
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TED STEWART  
United States District Judge

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<sup>8</sup>Docket No. 24, Memorandum Decision and Order Granting Defendant’s Motion for Summary Judgment at 2 (quoting *United States v. Simons*, 129 F.3d 1386, 1388-89 (10th Cir. 1997) (other quotations and citations omitted)).

<sup>9</sup>*Id.*

<sup>10</sup>*Servants of Paraclete*, 204 F.3d at 1012.